IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
June 15, 2009 Session

GINGER WISE, individually, and as next of kin of ANNE SMITH, deceased, v. HERITAGE ASSISTED LIVING d/b/a HERITAGE HOME FOR SENIORS, LP

Appeal from the Circuit Court for Knox County
No. 336707 Wheeler A. Rosenbalm, Circuit Judge

No. E2008-02710-COA-R3-CV - FILED SEPTEMBER 9, 2009

This appeal involves a Motion to Compel Arbitration. In the underlying wrongful death action, Ginger Wise ("Wise"), acting individually and as next of kin to her mother, the decedent Anne Smith ("Smith") sued Heritage Home for Seniors, LP ("Heritage"). Heritage filed a Motion to Compel Arbitration based upon an arbitration clause contained in the residency agreement ("Agreement"). The Agreement was signed by Wise when Smith was admitted to Heritage. Wise responded that she was not actually authorized to act as Smith's attorney-in-fact at that time because Smith had not been found incompetent by a physician and therefore the power-of-attorney never became effective. In the alternative, Wise argued that the arbitration clause was unconscionable. The trial court denied the Motion to Compel Arbitration and declined to rule on whether the arbitration clause was unconscionable. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed; Case Remanded

JOHN W. MCCLARTY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J. and D. MICHAEL SWINEY, J. joined.

Thomas Pinckney and Susan D. Bass, Nashville, Tennessee, for the Appellant, Heritage Assisted Living d/b/a Heritage Home for Seniors, LP.

Mark N. Geller and Carrie W. Smith, Knoxville, Tennessee, for the Appellee, Ginger Wise.

OPINION

I.

FACTUAL BACKGROUND

On November 25, 2003, Smith executed a Durable Power of Attorney For Health Care and Other Purposes ("POA"). The POA appointed Wise as Smith's attorney-in-fact. The POA gave Wise broad powers to enter into contracts, make business decisions, and make health care decisions on behalf of Smith.

Paragraph seven of the POA states, in pertinent part:

> 7. In addition, my Attorney-in-Fact may enter into contracts for my entry into and maintenance in, or release from, any hospital, convalescent center, nursing home or other type of health care center. . .should I at any time in the opinion of a licensed physician be incompetent or incapable of acting for myself. . . .

Paragraph fourteen of the POA states, in pertinent part:

> 14. This instrument is to be construed and interpreted as a durable and general power of attorney. This enumeration of specific items, rights, acts or powers herein is not intended to, nor does it, limit or restrict, and is not to be construed or interpreted as limiting or restricting, the general powers herein granted to my said Attorney-in-Fact . . . .

In May 2005, Smith was admitted to Heritage, at which time Wise executed the Agreement on behalf of Smith. The Agreement contained the arbitration clause that was in approximately 13 point font and labeled "ARBITRATION." It was set out in a separate paragraph on the second page of the two-page Agreement. It stated:

> Arbitration is a method of resolving disputes without the substantial time and expense of using the court system. By signing this agreement, the resident agrees that any dispute related to the services rendered by Heritage Home for Seniors will be resolved by binding arbitration. Heritage Home for Seniors, the resident and any of the resident's heirs, spouse, or assigns will be bound by the arbitrator's decision and each give up their right to a jury trial. Any award of the arbitrator(s) may be entered as a judgment in any court having jurisdiction. In the event a court of proper jurisdiction finds any portion of this agreement unenforceable, that portion shall not be effective and the remainder of the agreement shall remain in full force and effect. This agreement to arbitrate shall be governed by and interpreted under the Federal Arbitration Act.

Other than the above documents, the primary evidence available to the trial court concerning the circumstances surrounding Smith's admission was Wise's affidavit and deposition. Wise stated in Paragraph 4 of her affidavit that no physician had ever declared Smith incompetent, and that fact has subsequently become undisputed. During her deposition, Wise described the decision to admit Smith:

Q. Was it your decision alone to put [Smith] into assisted living?
A. Yes, it was.
Q. It was not her decision in any way?
A. At the time she was admitted it was not her decision.
Q. And why wasn't it her decision?
A. She was just probably at that point in time we knew when it was time to put her there.
Q. Was she incapable of making that decision? Well, let me rephrase. Was she incapable of making a reasonable decision at that time about that matter?
A. I don't think that she was incapable of it. We just did it for her safety.
Q. Did she agree to it?
A. Yes.
Q. Did she have any reluctance?
A. No.

Wise further described the admittance procedure:

Q. Would you have let your mother sign the agreement?
A. Well, if my mother signed the agreement?
Q. Would you have let her?
A. Yes.
Q. Why didn't you let her?
A. Because I had the power of attorney.
Q. But your lawyer in this case is making the argument that that's not a valid application of the power of attorney. You realize that, that you did not have – your lawyer is making the argument that [the POA] does not authorize you to sign that agreement?
A. Maybe Heritage should have picked up on that.
Q. Should you have picked up on it?
A. Possibly, but Heritage should have also.
Q. I mean it's your job to pick up on that, isn't it? You're acting as agent for your mother, aren't you?
A. Yes, I am or was.
Q. There was no doubt but that you were acting with her full approval, is there?
A. I was acting on her best behalf.
Q. You were acting with her full approval, right?
A. Yes.

Wise then explained her understanding of her role as Smith's agent acting with Smith's

consent:

Q. Do you know that your lawyer in this case has articulated that you did not have authority to represent your mother's interest in signing this agreement?
A. I know now from the power of attorney.
Q. But I didn't ask just about the power of attorney. Your lawyer has actually said to the court that you did not have authority to act on your mother's behalf in this case.
A. Correct.
Q. Do you agree with that?
A. Yes.
Q. Why did you - you weren't acting as your mother's knowing agent in this case?
A. I thought I was.
Q. And is there any reason – did your mother not consent to your doing exactly what you did in this case?
A. Did my mother not consent?
Q. I'll ask it again in a better way. Didn't your mother consent to you representing her interests in this specific case?
A. Well, my mother did not consent [to] me [representing her interests] in this particular case because she's passed away.
Q. No, in the admission process to Heritage?
A. Oh, in the admission process.
Q. She consented, didn't she?
A. Correct.
Q. She consented to your role in that as her agent, didn't she?
A. Yes.
Q. So it's not true, is it, that you were not acting with your mother's full blessing in everything you did in admitting her to Heritage, is it?
A. It was not true that – please repeat that.
Q. No, I'll tell you what I'll ask it different.
A. Rephrase it for me.
Q. That's lawyer talk and I apologize. Isn't it true that your mother consented to everything you did in terms of the admission process to Heritage?
A. Yes.
Q. And she never voiced any disagreement with your role as her agent in getting her into Heritage, did she?
A. No.

Smith subsequently suffered a fractured hip from a fall at Heritage and died from her injuries on March 18, 2007. Wise filed the underlying wrongful death lawsuit on August 14, 2007. Heritage filed a Motion to Compel Arbitration and Stay Litigation. In response to the Motion, Wise argued that 1) the arbitration clause in the Agreement was unconscionable, and 2) she had no authority to enter into the Agreement because of Paragraph 7 of the POA.

II.

RULING IN THE TRIAL COURT

Although the trial judge found that the arbitration agreement was not unconscionable, he did not rule on this issue. He did, however, rule that the arbitration clause was unenforceable based on Wise's lack of authority under Paragraph 7 of the POA. He stated:

> [A]bsent some evidence that there was an opinion of incompetency by a licensed physician that Anne Lee Smith could [not] have acted on her own, and she did not surrender her right to deal with these issues to the attorney in fact at that time[, . . .] I'll overrule the motion to compel arbitration, and to stay this litigation solely and exclusively on that ground.

The trial court's order stated as follows:

> 1. Ms. Wyse [Wise] did not have a power of attorney, express agency, or apparent agency to sign the arbitration agreement;
> 2. The arbitration agreement was unenforceable because Ms. Wyse [Wise] did not have authority to sign the arbitration agreement.

Heritage appeals the trial court's order pursuant to Tenn. Code Ann. § 29-5-319 (2000).

The statute allows an appeal to be taken from "[a]n order denying an application to compel arbitration . . . . "Tenn. Code Ann. § 29-5-319(a)(1)

III.

ISSUES FOR REVIEW

Heritage raises the following issue:

I. Did the trial court err in denying Appellant-Defendant's Motion to Compel Arbitration exclusively on the grounds that Anne Smith had not authorized her daughter, Ginger Wise, to enter into Smith's residency agreement on Smith's behalf, including the arbitration provision?

Wise raises the following issue:

II. Did the trial court err in finding that the arbitration provision in the admission contract was not unconscionable?

IV.

STANDARD OF REVIEW AND LEGAL PRINCIPLES

On appeal, this court reviews a grant or denial of a motion to compel arbitration under the same standards that apply to bench trials. *Mitchell v. Kindred Healthcare Operating, Inc., No. W2008-01643-COA-R3-CV,* 2009 WL 1684647, at *3 (Tenn. Ct. App. W.S., June 17, 2009). We review the enforcement of an arbitration agreement *de novo*. *Rosenberg v. BlueCross BlueShield of Tenn., Inc.*, 219 S.W.3d 892, 903 (Tenn. Ct. App.2006) (citing *Cooper v. MRM Inv. Co.*, 367 F.3d 493, 497 (6th Cir. 2004)). A presumption of correctness is afforded to the trial court's findings of fact, unless the evidence preponderates otherwise. Tenn. R. App. P. 13(d); *T.R. Mills Contractors, Inc. v. WRH Enter.,* 93 S.W.3d 861, 864 (Tenn. Ct. App.2002). However, there is no presumption of correctness afforded to a trial court's conclusions of law. *T.R. Mills Contractors, Inc.*, 93 S.W.3d at 864 (citations omitted).

"[P]owers of attorney are to be construed in accordance with the rules for the interpretation of written instruments generally; in accordance with the principles governing the law of agency, and, in the absence of proof to the contrary, in accordance with the prevailing laws relating to the act authorized." *Owens v. Nat'l Health Corp.*, 263 S.W.3d 876, 884 (Tenn. 2007) (quoting 3 Am.Jur.2d *Agency*, § 27 (2007)) (emphasis omitted). In *Tenn. Farmers Life Reassurance Co. v. Rose*, 239 S.W.3d 743 (Tenn. 2007), the Tennessee Supreme Court provided a thorough explanation of the principles relevant to powers of attorney:

> The legal effect of a written contract or other written instruments is a question of law. Thus, powers of attorney should be interpreted according to their plain terms. ***There is no room for the construction of a power of attorney that is not ambiguous or uncertain, and whose meaning and portent are perfectly clear.*** However, when the meaning of a power of attorney is unclear or ambiguous, the intention of the principal, at the time of the execution of the power of attorney, should be given effect. While the parol evidence rule applies, the courts may arrive at the meaning of a power of attorney by considering the five factors identified in Restatement (Second) of Agency section 34.[1]

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[1]The five factors listed in Restatement (Second) of *Agency* § 34 include:
(a) the situation of the parties, their relations to one another, and the business in which they are engaged;
(b) the general usages of business, the usages of trades or employments of the kind to which the authorization relates, and the business methods of the principal;
(c) facts of which the agent has notice respecting the objects which the principal desires to accomplish;
(d) the nature of the subject matter, the circumstances under which the act is to be performed and the legality or illegality of the act; and
(e) the formality or informality, and the care, or lack of it, with which an instrument evidencing the authority is drawn.

> A formal written instrument that has been carefully drawn can be assumed to spell out the intent of the author with a high degree of particularity. Thus, an instrument like a power of attorney should be subjected to careful scrutiny in order to carry out the intent of the author and no more. There should be neither a "strict" nor a "liberal" interpretation of the instrument, but rather a fair construction that carries out the author's intent as expressed in the instrument.

239 S.W. 3d at 749-50 (citation omitted) (emphasis added).

V.

DISCUSSION

Heritage's argument

Heritage argues that nowhere does the POA limit or restrict Wise's power to enter contracts for Smith *only* during Smith's incompetency. According to Heritage, Paragraph 7 is simply the enumeration of powers conditioned on a finding of incompetency. Heritage claims, however, that the language in Paragraph 14 shows that Smith did not intend to restrict Wise's general power to perform legal acts on her behalf while Smith was competent. Since Smith was presumably competent at the time of her admission, Wise therefore was acting under a valid POA.

In the alternative, Heritage argues that even if the POA is invalid, Smith conveyed express actual authority to Wise to enter into the Agreement. Thus, Heritage asserts that Smith is bound by common law agency principles. Heritage contends that there is ample evidence that Smith "agreed" to the decision to be admitted; that Smith gave Wise "her full approval" to act as her agent in the admissions process; that Smith "consented" to everything Wise did in terms of the admission process; and that Smith knew Wise was acting as her agent.

Wise's response:

Wise responds that the trial court was correct in its interpretation of the POA - specifically that Paragraph 7 makes Paragraph 14 inapplicable since no physician ever declared Smith incompetent. Wise further argues that she was never given any express, actual authority to bind Smith.[2] Wise contends that there is "no evidence that Mrs. Smith told her daughter to execute the documents in question or even discussed them with her daughter." Instead, Wise signed the documents based on her assumption regarding the POA. Wise relies heavily on *Hendrix v. Life Care Centers of America*, No. E2006-02288-COA-R3-CV, 2007 WL 4523876 (Tenn. Ct. App. E.S., Dec. 21, 2007) in support

[2]Wise also argues that she did not have apparent authority to admit Smith. Because Heritage did not raise an apparent agency argument, we will not address this issue.

of her arguments.

In *Hendrix*, this court upheld the trial court's denial of a motion to compel arbitration in a wrongful death case. Hendrix checked her mother into a nursing home under the purported authority of a POA. The POA in *Hendrix* read "[t]his healthcare durable power of attorney only becomes effective when I can't make my own medical decisions." *Id*. at *3. As in this case, the admission agreement contained an arbitration clause. In reaching the ultimate holding, we found that the POA was ineffective since the mother had not been incapacitated when she was admitted. *Id*. at *5.

In *Hendrix*, this court also rejected the nursing home's argument that either actual or apparent authority bound the mother to the arbitration clause. Concerning actual authority, we determined there was no evidence in the record that mother expressly authorized her daughter to sign the admission documents. *Id*. at *6. This court also found that there could be no apparent authority, since apparent authority arises from conduct of the principal - in this case the mother - and not from the conduct of the daughter. *Id*. at *5. Thus, whatever daughter's beliefs, understandings, or representations were, they were found to be insufficient to bind the mother.

Closely related to her express authority argument, Wise further argues that Smith did not ratify the Agreement since there is no evidence that Smith expressly gave Wise authority to sign the Agreement. Wise supports her proposition with *Thornton v. Allenbrooke Nursing and Rehab. Ctr.,* No. W2007-00950-COA-R3-CV, 2008 WL 2687697, at *8 (Tenn Ct. App. W.S., July 3, 2008). *Thornton* held, *inter alia*, that a mother did not ratify her daughter's unauthorized signing of a nursing home admission agreement - which contained an arbitration clause - since the mother did not have full knowledge of all of the material facts and circumstances included in the agreement. Wise claims that in the case at bar, there is also no evidence that the Agreement's *specific* terms were discussed.

Finally, Wise argues that the arbitration provision is both procedurally and substantively unconscionable. Although Wise has both procedural and substantive arguments in her brief, they overlap each other considerably. Generally she contends the arbitration clause is unconscionable since 1) the arbitration provision is not a stand-alone document, 2) it is sandwiched among other unrelated provisions, 3) its font size is the same as the rest of the document, 4) the provision does not adequately explain how the arbitration process works, 5) Wise was not afforded the right to object to the provision, and 6) the reasonableness of the provision could not be determined simply by looking at the agreement.

Heritage's reply

Heritage contends that Wise's deposition answers reveal that Smith gave Wise express actual authority to sign the admission documents separate and apart from the POA. Heritage opines that *Hendrix* does not impose a requirement that the principal and agent specifically discuss the documents at issue. According to Heritage, even if it did, Smith's agreement, consent, approval, and knowledge that Wise was acting as her agent implies that such a prior discussion occurred.

Heritage further attacks Wise's ratification argument by arguing that it is not suggesting that Smith ratified an *unauthorized* act by Wise. Instead, Heritage contends that Wise was authorized to enter into the Agreement because of express authority and that such authorization extended to every provision in the Agreement.

As far as unconscionability is concerned, Heritage argues 1) the arbitration clause is not buried in a boiler-plate form contract, 2) it was not presented as a precondition for admission, 3) the clause is conspicuous and understandable, and 4) it is clearly labeled ARBITRATION in 13 point font on the second page.

Power of Attorney

From our reading of the power of attorney, we find that the meaning of Paragraph 7 within the POA is unambiguous: Wise's ability to admit Smith to an assisted care facility was contingent upon a physician's finding that Smith was incompetent.

We further find no merit in Heritage's interpretation of the relationship between Paragraph 14 and Paragraph 7. As mentioned above, Paragraph 14 states, in pertinent part, "[t]his enumeration of specific items, rights, acts or powers herein is not intended to, nor does it, limit or restrict, and is not to be construed or interpreted as limiting or restricting, the general powers herein granted to my said Attorney-in-Fact. . . ."

According to Heritage, these "general powers herein granted" allow Wise to perform any legal act - including admitting Smith to an assisted care facility - while Smith was competent. On the other hand, Heritage contends that Paragraph 7 is purportedly only an "enumeration of a specific power" conditioned on incompetency. Because Paragraph 14 states that the enumerated, specific powers do not restrict the general powers, Heritage opines that the fact that Smith was not found incompetent pursuant to Paragraph 7 has no bearing on Wise's general powers to admit Smith. Thus, Heritage contends that Wise properly admitted Smith pursuant to the "general powers" provided by the POA.

Such a construction is untenable because it makes Paragraph 7 completely redundant. It begs the question: If the general powers of the POA allowed Wise to admit Smith at any time while Smith was competent, why would those powers not also apply when she was incompetent? In other words, why the need for a separate, duplicative provision to clarify that those same powers continued to exist if Smith was found to be incompetent? Furthermore, such an interpretation of the POA detrimentally marginalizes the physician's role. Under Heritage's interpretation, a physician's professional opinion as to competency is irrelevant because the attorney-in-fact has the power to admit the principal even if the principal is competent. Heritage's construction again raises the question of why a provision concerning a physician would even be needed in the POA in the first place.

The inclusion of Paragraph 7 was clearly meant to limit Wise's power when it came to admitting Smith into an assisted living facility. Furthermore, such a construction is unambiguous

because it is the only one that makes logical sense. Even if we assume that Smith was not competent at the time that Wise signed the agreement, that fact does not make a difference – Wise "must have some basis of authority" *Ricketts v. Christian Care Center of Cheatam County*, *Inc.*, No. M2007-02036-COA-R9-CV, 2008 WL 3833660, at *2 (Tenn. Ct. App. M.S., Aug. 15, 2008). Without a finding of incompetency by a physician, Wise's power to admit Smith was ineffective. Because it is undisputed that no physician ever declared Smith to be incompetent, we hold that Wise did not have the authority to admit Smith based on the POA.

Whether Wise had Actual Authority to Admit Smith

In determining whether Smith granted Wise actual authority to admit Smith, we are guided by our previous holdings in *Hendrix* and *Mitchell.* In *Hendrix*, the nursing home argued that mother gave daughter express authority to handle the admission process, regardless of the status of the POA. In rejecting this argument, this court wrote:

> ***[T]he evidence offered by Nursing Home in support of this argument is inextricably intertwined with the power-of-attorney issue.*** Nursing Home's brief quotes from Daughter's deposition as follows:
>
> Q. So was it your understanding at that time that *once that [power of attorney] document was signed* you had the ability to sign the checks and do other things for your parents' needs?
> A. As designated by them, yes. If they asked me to, yes.
> Q. Okay. Your understanding was that *once this was signed* on June the 2nd, 2003, if they asked you to do something for them, you had the power to do it by this document?
> A. That's correct.

(Emphasis in original.)

> As can be seen, both questions and answers relate specifically to the powers purportedly vested by the power-of-attorney document, not to a separate agency relationship that can be analyzed independently of that document. Daughter's testimony establishes only that she believed she had the authority to act on Mother's behalf *because of the POA document*-the very document that we have already found to be ineffective for purposes of this case. Daughter's "understanding" of the POA does not alter its legal effect, and her erroneous beliefs about the scope of her attorney-in-fact powers certainly cannot create an independent agency relationship, separate and apart from the very document she was testifying about**.**

Hendrix, 2007 WL 4523876, at *5 (emphasis in original) (internal citation and footnote omitted).

In *Mitchell*, this court followed *Hendrix's* reasoning in upholding the trial court's finding that

Mitchell lacked actual authority to execute a nursing home arbitration agreement on behalf of her mother. As in *Hendrix* and the case at bar, Mitchell signed the arbitration agreement under a purported power of attorney that this court found to be ineffective. The nursing home subsequently alleged that regardless of the effectiveness of the power of attorney, Mitchell acted under express actual authority from her mother. Based on our previous reasoning in *Hendrix*, we held that there was no evidence of an independent agency relationship apart from the "Revocation Of Power Of Attorney" document, which we had previously found ineffective. *Mitchell,* 2009 WL 1684647, at *6. We further found there was no evidence in this case that the mother expressly authorized the daughter to sign the admission documents. *Id.*

Turning to the case at bar, Wise's deposition testimony clearly shows that her understanding of her authority was, per *Hendrix*'s language, "inextricable intertwined with the power of attorney issue." For instance, when testifying about the admittance procedure, Wise stated:

Q. Would you have let you mother sign the agreement?
A. Well, if my mother signed the agreement?
Q. Would you have let her?
A. Yes.
Q. Why didn't you let her?
A. Because I had the power of attorney.
Q. ***But your lawyer in this case is making the argument that that's not a valid application of the power of attorney. You realize that, that you did not have – your lawyer is making the argument that [the POA] does not authorize you to sign that agreement?***
A. Maybe Heritage should have picked up on that.
Q. Should you have picked up on it?
A. Possibly, but Heritage should have also.
Q. I mean it's your job to pick up on that, isn't it? You're acting as agent for your mother, aren't you?
A. Yes, I am or was.
Q. There was no doubt but that you were acting with her full approval, is there?
A. I was acting on her best behalf.
Q. You were acting with her full approval, right?
A. Yes.

This exchange clearly shows that Wise's understanding of her authority originated from her erroneous assumptions concerning the POA. Similarly, the following testimony also shows her reliance on the POA:

Q. Do you know that your lawyer in this case has articulated that you did not have authority to represent your mother's interest in signing this agreement?
A. I know now from the power of attorney.
Q. But I didn't ask just about the power of attorney. Your lawyer has actually said to the court that you did not have authority to act on your mother's behalf in this case.

A. Correct.
Q. Do you agree with that?
A. Yes.
Q. Why did you - you weren't acting as your mother's knowing agent in this case?
A. I thought I was.

It is evident that Wise "thought she was" acting as Smith's agent based on the POA, and not a separate express grant of authority from her mother. A few sentences later she agrees that she was acting as Smith's agent:

Q. She consented to your role in that as her agent, didn't she?
A. Yes.
Q. So it's not true, is it, that you were not acting with your mother's full blessing in everything you did in admitting her to Heritage, is it?
A. It was not true that – please repeat that.
Q. No, I'll tell you what I'll ask it different.
A. Rephrase it for me.
Q. That's lawyer talk and I apologize. Isn't it true that your mother consented to everything you did in terms of the admission process to Heritage?
A. Yes.
Q. And she never voiced any disagreement with your role as her agent in getting her into Heritage, did she?
A. No.

Again, Wise's understanding of her "agency" clearly arises from her assumption that her authority was derived from the POA. As we wrote in *Hendrix*, "her erroneous beliefs about the scope of her attorney-in-fact powers certainly cannot create an independent agency relationship, separate and apart from the very document she was testifying about." *Hendrix*, 2007 WL 4523876 at *5. Nothing in Wise's deposition testimony reveals that there was an independent agency relationships separate and apart from the one she incorrectly believed was formed by the POA.

Like in *Mitchell*, there is no evidence in this case of an independent agency relationship apart from the POA. Regardless of whether Smith "consented" to everything Wise did in terms of the admission process, that consent was clearly based on Wise's erroneous understanding of the POA, and not an independent agency relationship. There is no evidence that Smith expressly authorized Wise to sign her admission documents apart from the POA. Thus, based on our previous reasoning in *Hendrix* and *Mitchell*, we hold that there was no express agency relationship between Wise and Smith and that Wise did not have the authority to admit Smith based on such a relationship.

Whether the Arbitration Clause is Unconscionable

In *Owens v. National Health Corp.*, 263 S.W. 3d 876 (Tenn. 2007), the Tennessee Supreme Court noted that "[a] contract may be unconscionable if the provisions are so one-sided that the contracting party is denied an opportunity for a meaningful choice." 263 S.W. 3d at 889 (citing *Haun*

v. King, 690 S.W. 2d 869, 872 (Tenn. Ct. App. 1984) (quoting *Benner v. Little Red Sch. House*, *Ltd.,* 302 N.C. 207, 274 S.E. 206, 210 (1981), our high court held that "in making such a determination," a court must consider all the facts and circumstances of a particular case." 263 S.W. 3d at 889. The trial court in the instant matter did not hear evidence on this issue.

We have concluded that because Wise had no authority to admit Smith under either the POA or an independent agency relationship, Smith is not bound by the Agreement. As a result, Smith is also not bound by the arbitration clause contained in the Agreement. Thus, whether the arbitration clause in unconscionable is a moot point and we decline to remand for further proceedings on this contention. Therefore, in the interests of judicial economy, we decline to comment on this question or to express an opinion "As to the ultimate resolution of the unconscionability issue." *Id*.

VI.

CONCLUSION

The judgment of the trial court that the arbitration clause is unenforceable based on Wise's lack of authority per Paragraph 7 of the POA to enter into the Agreement is affirmed. We further hold that, based on our previous decisions in *Hendrix* and *Mitchell*, no independent express agency relationship existed between Wise and Smith that could have bound Smith to the Agreement. Thus, Smith is not bound by the Agreement's arbitration clause through either the POA or an agency relationship. Accordingly, the arbitration provision is not enforceable against Smith's estate and wrongful death beneficiaries. We decline to comment on whether the arbitration clause is unconscionable since the issue has become moot. This case is remanded to the Trial Court for further proceedings consistent with the opinion of this court. The costs on appeal are assessed to Heritage Assisted Living d/b/a Heritage Home for Seniors, LP., pursuant to applicable law.

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JOHN W. McCLARTY, JUDGE